89-1206

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD J. ELKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 28, 1989

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QUESTIONS PRESENTED

1. Whether *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987) requires reversal of Petitioner's conviction for violation of Title 18, United States Code, Section 371 where one of four underlying purposes of the conspiracy was the substantive offense of wire fraud to deprive the United States of the right to implement its foreign policy and the jury returned a general verdict without designating which of the underlying purposes of the conspiracy was the basis for the guilty verdict?

2. Does an *Allen* charge given after eight days of jury deliberation and when the trial court knew the numerical division of a deadlock jury create a denial of due process and thus deny Petitioner a fair trial?

3. Whether Petitioner's sentence violates the Eighth Amendment's prohibition against disproportionate sentences and also if the trial court improperly determined the amount of fine to be imposed for a violation of the export control laws?

LIST OF PARTIES

The parties to the proceeding below were Petitioner, Edward J. Elkins, and Respondent, the United States of America.

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No. ____

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edward J. Elkins respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on September 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at _____ F.2d _____ and is reprinted in the Appendix hereto, 1a-28a, infra.

The judgment and commitment of the United States District Court for the Northern District of Georgia are reprinted in the Appendix hereto, 29a-31a, infra.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on September 29, 1989, affirming Petitioner's conviction dated August 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. V: No person . . . shall . . . be deprived of . . . liberty or property, without due process of law . . . .

U.S. Const. amend. VIII: . . . nor excessive fines imposed, nor cruel and unusual punishment inflicted.

18 U.S.C. § 371: Conspiracy

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343: Fraud by wire

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire . . . for the purpose of executing such scheme or artifice, shall be fined not more than a $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 3623: Alternative fines

(a) An individual convicted of an offense may be fined not more than the greatest of . . . (3) in the case of a felony, $250,000 . . . .

22 U.S.C. § 2778(b)(2)

. . . no defense articles . . . designated by the President under subsection (a)(1) of this section may be exported . . . without a license for such export . . . .

22 U.S.C. § 2778(c)

. . . any person who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein . . . shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than ten years, or both.

50 U.S.C. § 1702: Presidential authorities

. . . the President may, under such regulations as he may prescribe . . . prevent or prohibit . . . exportation of any property . . . .

50 U.S.C. § 1705(b)

Whoever willfully violates any license, order or regulation issued under this chapter shall, upon conviction, be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; or any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

50 App. U.S.C. § 2410

. . . whoever knowingly . . . conspires to violate . . . any provisions of this Act . . . shall be fined not more than five times the value of the export involved or $50,000 whichever is greater, or imprisonment not more than five years, or both.

STATEMENT OF THE CASE

The issues presented here arose from the investigation and prosecution of Petitioner for his role in selling two Lockheed L-100-30 aircraft to Libya. The alleged violations occurred on or before December of 1983 and up to June 28, 1985. The indictment returned in the United States District Court for the Northern District of Georgia charged Petitioner, six other individuals and four corporations with conspiracy to engage in a prohibited foreign exchange (count 1), two substantive acts of engaging or attempting to engage in impermissible exportation activity (counts 2 and 3), false statements (count 4), and wire fraud (counts 4-7), in violation of 18 U.S.C. [Section] 371, 50 U.S.C. 1705, 50 App. U.S.C. 2410(a), 18 U.S.C. 1001 and 18 U.S.C. 1343. Petitioner was tried on counts 1 through 3 jointly with co-defendants David Baskett, Thomas Burnham and Franklin Corcoran. Upon motion of the government, the case against Baskett was dismissed in mid-trial. The jury acquitted Burnham and Corcoran on all counts. Petitioner was acquitted on count 3, but convicted on counts 1 and 2. Appellant was sentenced to consecutive terms of imprisonment for five years on count 1 and ten years on count 2. In addition, he was fined $6,600,000. The mandatory $50 per count special assessment was also imposed. (R9-19 & 20).

Petitioner owned and operated Armoflex in Santa Maria, California, which manufactured armor-related products (R26-173). In the summer of 1984, Petitioner was contacted by a concern that wanted to acquire a C-130 aircraft for oil field work in Libya (R11-37-48). Since a friendly country was required to purchase these planes, Bolivia was suggested but Bolivia renounced their sponsorship and the deal ended (R11-53-58). Lockheed suggested L-100-30 civilian transport planes (R11-62) as an equivalent aircraft and the Libyan national wanted information about aerial refueling kit (R11-64). Option II was conceived (R11-68) to develop kits (R11-72) with Aero Union of California (R11-73).

Mr. Badir, the Libyan national, invited Lockheed to check his legitimacy and to confirm that he was not hiding his Libyan nationality (R11-77). Lockheed sent a representative who met with Mr. Badir in West Germany (R11-78). Lockheed appeared satisfied that the sale to Comtrust, a West German subsidiary of the national oil company, was not a sham despite the Libyan nationality of its principals (R11-79) and contracts for the sale of the planes were drafted in March of 1985 (R11-81).

Lockheed made the decision to sell the aircraft to Armoflex (AFI) and not Comtrust (R11-82). It was agreed that the aircraft would fly from Marietta, Georgia to France and then to Benin (R11-102). The required documents were provided (R11-111) and a meeting was arranged in March of 1985. Before Mr. Badir would sign the contract, he insisted that he would retain 2.5 million to ensure AFI would continue with Option II after the airplanes were exported (R11-118-119). On March 28, 1985 a meeting was held at the Commerce Department to complete and file the application

for export license for the aircraft. At that meeting, Lockheed convinced the Commerce Department that AFI would file for the license claiming that it was a domestic sale in which AFI obtain control at the time of the export (R20-126). Lockheed's licensing administrator told the representatives of the Commerce Department that the Libyan nationals were expatriots and anti-Ghadafi and good Libyans with no ties to Tripoli (R22-10). Lockheed's representative provided the Commerce Department with a Comtrust Dunn & Bradstreet report which convinced the Commerce Department to expedite the license process without a thorough pre-license investigation (R22-65-66).

Petitioner never knew that the Lockheed representative had a separate meeting with the Commerce representatives or that the license application was expedited to enable Lockheed to obtain the purchase price on an expedited basis (R22-72). A license was issued and the planes were flown to France and then Benin. After the planes were flown to Benin, the parties again met in Europe to contract for two additional L-100s (R11-123). On January 27, 1985 Petitioner returned to Atlanta where he was met by Lockheed's representatives who surreptitiously recorded a conversation. The recording was made at the direction of custom agents to ascertain whether Petitioner knew that the planes had been diverted to Libya (R11-108). After an hour-long meeting orchestrated by the customs agents, Lockheed's representative believed and reported to the agents that Petitioner was clean and had no knowledge of the diversion (R17-20).

REASONS FOR GRANTING WRIT

I. THE ELEVENTH CIRCUIT HAS FAILED TO FOLLOW THE HOLDING OF *MCNALLY V. UNITED STATES* AND THEREFORE PETITIONER'S CONVICTION FOR CONSPIRACY TO DEPRIVE THE UNITED STATES OF THE RIGHT TO IMPLEMENT ITS FOREIGN POLICY WAS BASED ON AN IMPERMISSIBLE GROUND AND THE GENERAL JURY VERDICT RETURNED ON THIS COUNT IS IMPROPER

Petitioner's conviction under count one must be reversed. This case is controlled by this Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1978). In *McNally*, this Court held that 18 U.S.C.A. Section 1341, the mail fraud statute, applies only to schemes to defraud others of property rights. Accordingly, *McNally* rejects the view that the mail fraud statute proscribes schemes to defraud individuals or entities of intangible rights and held that the statute is "limited in scope to the protection of property rights". The *McNally* analysis applies equally to wire fraud. *See Carpenter v. United States*, 108 S.Ct. 316, 320 n. 6 (1987).

It must be remembered that count one of the indictment charged Petitioner with participating in a conspiracy having four alleged unlawful objectives. The first objective was an alleged agreement to export to Libya commercial aircraft and their additional spare parts without first obtaining the required export license, in violation of 50 U.S.C. App. Section 2410(a) and regulations issued thereunder. The second object alleged a conspiracy to export to Libya items subject to control under United States' munitions list in violation of 22 U.S.C. Section 2778(b)(2) and

(c) and 22 C.F.R. Section 121 *et seq.* The third object of the conspiracy alleged an agreement to violate 18 U.S.C. Section 1001. The fourth alleged unlawful object charged a wire fraud scheme and artifice to defraud the United States and its executive agencies of the right to implement its foreign policy and to conduct its export laws free from stealth, false statements and fraud, in violation of 18 U.S.C. Section 1343. The conspiracy count did not elaborate on the nature and the scope of the alleged scheme to defraud.

The three substantive wire fraud counts to define the scheme alleged in the conspiracy were dismissed by the District Court following a defense motion (R25-57-69, 153, 155-156). The jury was instructed that it could find Petitioner guilty of this conspiracy as long as it unanimously agreed that Petitioner conspired to commit any one of the four supposed unlawful objectives (R29-24, 160). On June 5, 1987 the jury returned a *general* verdict of guilty on count one. Under *McNally*, the fourth object of the conspiracy incorrectly charged Appellant with conduct that was not criminal. No one knows if the jury considered this an object of the conspiracy.

The Eleventh Circuit opinion affirming Petitioner's conviction on count one which affirms the general verdict violates the well established principle that convictions premised on general jury verdicts must be reversed in instances where the verdict makes it impossible to determine whether the defendant was convicted under an erroneous or a valid application of the law that had been submitted to the jury as an alternative basis of the defendant's guilt. *E.g.*, *Chiarella v. United States*, 445 U.S. 234, 238 n. 21 (1980); *Yates v. United States*, 354 U.S. 298, 312 (1957); *Stromberg v. Cali-*

fornia, 283 U.S. 359, 367-368 (1931). For all of the above reasons, the infirmity of Petitioner's conviction on count one is clear and Petitioner respectfully submits this Court must reverse his conviction on count one.

II. THE ELEVENTH CIRCUIT'S APPLICATION OF THE "*ALLEN* CHARGE" DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL AND THIS COURT SHOULD RECONSIDER THE PROPRIETY OF THE *ALLEN* CHARGE

The *Allen* Charge has been the object of great criticism by lower courts and commentators on the ground that it is potentially coercive both in its language and the circumstances in which it is administered. *See generally, Lowenfield v. Phelps*, _____ U.S. _____, 108 S.Ct. 546, 558-559 (Marshall, Brennan and Stevens dissenting); *United States v. Rey*, 811 F.2d 1453, 1458 n. 12 and 13 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 103 (1987); *see also*, Note *Deadlocked Juries and the Allen Charge*, 37 Maine Law Review 167, 171-173. Due to this criticism, the lower courts have grudgingly allowed variants of the charge, including a version formulated by the American Bar Association.[1] The rationale behind the varying formulations of the charge is to avoid those characteristics which are highly criticized without compromising the purpose in giving the original charge.

For example, the First, Third, Fourth, Seventh, Eighth and District of Columbia Circuits have in some cases

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[1] *See Lowenfield v. Phelps*, ____ U.S. ____, 108 S.Ct. 546, 550 (1988); ABA Special Committee on Minimum Standards for the Administration of Criminal Justice, Standards relating to Trial by Jury, sec. 5.4(b) (Approved Draft, 1968).

required the less criticized and more popular form recommended by the American Bar Association.[2] Other circuits, including the Eleventh Circuit, where Petitioner's case took place, have approved an *Allen* Charge that uses language that suggests jurors should not surrender their honest beliefs in order to reach a verdict.[3] In Petitioner's case, the trial court chose to use language almost verbatim, about which the Eleventh Circuit had previously expressed serious reservations. 811 F.2d 1453, 1459 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 103 (1987). *See also*, Petitioner's Brief p. 30. It is becoming increasingly apparent that there is a growing need for this Court to review not only the language of the charge, but also the propriety of the charge.

In Petitioner's case the jury deliberation had taken place for eight days. Although inadvertently volunteered, the numerical breakdown of the jury as 8-4, was nevertheless made known to both the judge and the jury (R3-98). Hence, from the jury's perspective the impetus to hastily reach a verdict was apparent. Thus the result is that the

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[2] *See, United States v. Anguilo*, 485 F.2d 37 (1st Cir. 1973); *United States v. Fioravanti*, 412 F.2d 407, 414-420 (3rd Cir.), *cert. denied*, 396 U.S. 837 (1969); *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970); *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973) (en banc); *Potter v. United States*, 691 F.2d 1275 (8th Cir. 1982); *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (en banc).

[3] The pattern of the *Allen* Charge used in this case is set out in the Appendix of this brief; *United States v. Burke*, 700 F.2d 70, 80 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Kelly*, 783 F.2d 575, 576-577 (5th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986); *United States v. Scott*, 547 F.2d 334 (6th Cir 1977); *United States v. Bonam*, 772 F.2d 1449, 1450 (9th Cir. 1985); *United States v. McKinney*, 822 F.2d 946 (10th Cir. 1987); *United States v. Rey*, 811 F.2d 1453 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 103 (1987).

seemingly innocuous language when given at a pivotal point in a trial earns the *Allen* Charge its most deserved alias "the dynamite charge." *See United States v. Bailey*, 480 .2d 518, 519 (5th Cir. 1973) (en banc); *Andrews v. United States*, 309 F.2d 127, 130 (5th Cir. 1962), *cert. denied*, 372 U.S. 946 (1963).

The controversy surrounding this charge has caused many courts to retreat from the use of it. *Rey, supra* at 1458. At least eighteen states have rejected the use of the charge, three federal circuits have prohibited the use of the charge, and four other circuits have limited their use of it. *Id.* As such this issue of the language and the circumstances that dictate when, or even if ever, the charge should be used, merits this Court's consideration. Accordingly, Petitioner respectfully urges this Court to reconsider the propriety of the *Allen* Charge.

III. THE ELEVENTH CIRCUIT HAS FAILED TO CORRECT PETITIONER'S SENTENCE WHICH VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST DISPROPORTIONATE SENTENCES AND ALSO THE ELEVENTH CIRCUIT IMPROPERLY DETERMINED THE MAXIMUM AMOUNT OF FINE TO BE IMPOSED UNDER THE EXPORT CONTROL LAWS.

Petitioner contends the Eleventh Circuit erred in failing to find that Appellant's sentence violates the Eighth Amendment prohibition against disproportionate sentences and also that the Eleventh Circuit also erred in holding that the fine imposed upon Petitioner exceeds the maximum fine prescribed by law. Petitioner was sentenced to a fifteen year term of imprisonment and a $6,600,000 fine (R7-52). Peti-

tioner contends that the lengthy term of incarceration and the payment of such an extremely high fine violates the Eight Amendment's prohibition against cruel and unusual punishment and violates the Amendment's requirement that sentences be proportionate to the gravity of the offense. Petitioner's brief to the Eleventh Circuit outlined the great disparity in sentencing for defendants similarly sentenced. In fact, the District Court observed that the sentence imposed on Petitioner was more severe than any sentence listed in the pre-sentence report (R7-49-51).

Petitioner submits that the Court incorrectly implied the penalty provisions under the International Emergency Powers Act ("IEEPA") and the Export Administration Act ("EAA") in opposing the fine and the fine was improperly enhanced. *See United States v. Holmes*, 822 F.2d 481, 494-496 (5th Cir. 1987). On March 30, 1984 by executive order number 12470 the President of the United States declared a national emergency in light of the expiration of EEA of 1979. Under section two of the executive order, the President directed that 50 U.S.C. Section 1702(b)(2) and 1705

> Shall control over any inconsistent provisions in the regulations with respect to . . . civil and criminal penalties for violations subject to this order (executive order 12470, 49 Fed. Reg. 13, 099 (April 3, 1984).

Accordingly, if the District Court had applied IEEPA correctly, considering all potential penalty provisions for a violation occurring on or about May 13, 1985, the maximum fine allowable would be $250,000. *See* 50 U.S.C. Section 1705(b); 18 U.S.C. Section 3623. Petitioner submits that under the existing law in May of 1985 EAA penalties were

not available to the Court under 50 U.S.C. App. Section 2410(a) and 15 C.F.R. Section 2871 and, therefore, the 6.6 million dollar fine imposed by the District Court was illegal.

CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

This 28th day of December, 1989.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8708

(D.C. Docket No. CR86-267A)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD J. ELKINS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(September 29, 1989)

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and MELTON*, District Judge.

JOHNSON, Circuit Judge:

This case arises on appeal from defendant's convictions of conspiracy in violation of 18 U.S.C.A. § 371, and of engaging in or aiding and abetting illegal export activity in violation of the Export Administration Act, 50 U.S.C.A. App. §

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* Honorable Howell W. Melton, U.S. District Judge for the Middle District of Florida, sitting by designation.

2410, the Arms Export Control Act, 50 U.S.C.A. §§ 1702, 1705, the International Emergency Economic Powers Act, 15 C.E.R. §§ 374.1, 387, and 399, and 18 U.S.C.A. § 2. We affirm.

I. FACTS

This prosecution arose out of an investigation into the 1985 shipment of two Lockheed L-100-30 aircraft to Libya. At the time, Libya was (and remains) subject to strict export controls. *See* 15 C.F.R. § 376.16; *see also* Executive Order No. 12543, January 7, 1986, 51 Fed. Reg. 875 (prohibiting trade with Libya). Export licenses were required for the export of these two jets; because of government restrictions on trade with Libya, no export licenses would have been given to export these planes to Libya. Defendant and several other individuals, six of whom were also indicted as a result of this investigation, engaged in a complex set of transactions to purchase the planes for a West German company owned and operated by Libyans, and to route the planes through Bourdeaux, France, to the small African nation of Benin, and then to Libya.

The sequence of events leading to defendant's arrest is complicated. Defendant owned Armaflex, Inc., a southern California company which produced ceramic tiles for military use as armor. In 1984, defendant attempted to supply ceramic tiles to an English firm for ultimate transfer to Libya. The Libyan dealer was named Badir, and he was purportedly associated with a West German oil field production company. This deal was never consummated.

In the summer of 1984, Carl Lilly, who had worked with defendant in the ceramic tile negotiations, approached

defendant on behalf of a customer[1] who wanted to purchase one Lockheed C-130 aircraft, a military transport plane, for oil field work in Libya. Because this plane had potential military application, the sale had to be cleared by the State Department. The State Department responded to inquiries about the export of this aircraft to Libya by stating that the transaction would not be approved. Baskett, a military officer who became defendant's employee, informed defendant of this refusal. Defendant then suggested an alternative plan that involved leasing the aircraft by Armaflex on behalf of Badir's West German company, TOP, or its subsidiary, Contrust, and basing it in Greece or Malta. Because this arrangement involved a lease rather than a sale to a company for use in Libya, the Department of Commerce, rather than the Department of State, would have had to approve it. The Commerce Department rejected this alternative. At about this time, the Air Force reclassified the KC-130[2] to make it impossible for a private company to obtain one of the aircraft unless acting on behalf of or sponsored by an acceptable foreign government. Badir and Lilly attempted to obtain sponsorship first from Morocco and subsequently from Bolivia. The government of Bolivia did sponsor the purchase temporarily, but disavowed that sponsorship after its agent

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[1] The customer was Corcoran, Lilly's father-in-law and a co-indictee, who was purportedly representing National Oil Company. Badir, the Libyan national involved in the prior transaction, was the ultimate recipient of the planes.

[2] The KC-130 is a modified version of the C-130 with air-to-air refueling capability. Badir indicated in November 1984 that he desired the KC-130 version.

in the negotiations, General Rodriguez, unsuccessfully attempted to overthrow the government.

At this point, defendant adopted the recommendation of an employee, Franklin, and suggested to Lilly that the customer, Corcoran, substitute the L-100-30 model for the KC-130, because the L-100-30 model did not need foreign sponsorship and because the Department of Commerce rather than State would review the transaction. Badir requested information about the L-100-30 aircraft, which defendant provided. Shortly after this communication, Badir inquired into modification kits for the L-100-30 to allow air-to-air refueling. Lilly discussed the modification with defendant. Defendant suggested a company in England, Flight Refueling Systems, that had modification kits available. After it became clear that the British company could not meet Badir's demands, defendant contacted a California company, Aero Union, about modification kits. Defendant did not disclose consideration or discussion of this modification to Lockheed, and defendant ordered Baskett to refrain from discussing it.[3]

Defendant originally negotiated with Lockheed as representative of Contrust, the West German oil exploration subsidiary controlled by Badir. Lockheed preferred to sell the aircraft to Armaflex, Inc., rather than to Contrust. Defendant created a second California corporation, AFI International, to represent Contrust in the negotiations. In nego-

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[3] This refueling modification was critical, because at the time Libya did not have air-to-air refueling capability. Badir purchased the plane contingent upon the availability of the modification, and entered into a Memorandum of Understanding with Elkins to that effect.

tiations with Lockheed, defendant maintained that the airplane was destined for the West African country of Benin. When Lockheed learned of Badir's involvement, however, Lockheed cancelled a March 1, 1985, negotiating session. Defendant quickly assured Lockheed that Badir represented a legitimate West German concern, and that he was a Libyan expatriate antagonistic to the Libyan government. The interruption in the negotiations arising from Lockheed's enlightenment about Badir's involvement was brief, and negotiations between defendant and Lockheed resumed. Defendant continued to assert that Badir had no connection with the Libyan government. At no time did defendant notify Lockheed that the plane was to be modified with mid-air refueling capability.

Defendant and Lockheed reached an agreement on the sale of two L-100-30 planes and parts. Defendant mailed the contract to Lilly in West Germany; Lilly traveled to Tripoli to deliver the contract to Badir and Badi, Badir's superior. While in Tripoli, Lilly also met with Abid Al-Jawwad, the banker for the transaction. While Lilly was traveling, defendant and Lockheed representatives executed the contract for the sale of the two L-100-30 airplanes to AFI. Defendant's net profit on the deal exceeded $7 million. The contract provided, among other things, that AFI had the sole responsibility to obtain a valid export license.

Lockheed officials accompanied defendant to the Department of Commerce to obtain an export license for the airplanes. Department of Commerce officials realized that Contrust, the West Germany company receiving the planes, was owned by Libyans. Defendant explained that the planes

were destined for Benin. At no time did defendant mention the planned refueling modification.

The Department of Commerce approved the export license on April 18, 1985. Lockheed delivered the aircraft within a month to Benin. The planes were never seen again in Benin. One of the airplanes was found at an airport in Cairo, Egypt, on March 7, 1987. The plane's radio signal and operations manual indicated that the plane had been used by the Libyan Arab Air Force.

Defendant was convicted on one count of conspiracy in violation of 18 U.S.C.A. § 371, and one count of violating export restrictions in violation of 50 U.S.C.A. App. § 2410, 50 U.S.C.A. § 1705, and 18 U.S.C.A. § 2. Defendant received a five-year sentence on count one. Defendant received a consecutive ten year sentence on count two and a $6,600,000 fine. A $50 per count special assessment was also imposed. Defendant appeals.

II. DISCUSSION

A. *The Effect of McNally*

The jury returned a verdict of guilty on Count One of the indictment which charged defendant with conspiracy to commit four substantive offenses against the United States.[4]

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[4] The indictment charged defendant with conspiracy to violate:

> (1) the Export Administration Act of 1979, as amended, Title 50, United States Code Appendix, Section 2410(a) . . . , (2) the Arms Export Control Act, Title 22, United States Code, Sections 2778(b)(2) and 2778(c), and Title 22, Code of Federal Regulations, Sections 121, *et seq.*; (3) Title 18, United States Code, Section 1001 and (4) Title 18, United States Code, Section 1343.

Conspiracy to commit an offense against the United States violates 18 U.S.C.A. § 371, which provides:

> If two or more persons conspire *either* to commit any offense against the United States, *or* to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(emphasis added). This statute is written in the disjunctive. A violation occurs if the defendant conspires to commit one or more substantive offenses against the United States, or if the defendant conspires to defraud the government in any manner or for any purpose.

Defendant was charged with conspiring to commit, among other things, the substantive offense of wire fraud against the United States. *See* 18 U.S.C.A. § 1343. That statute prohibits the use of wire transmission services in furtherance of any scheme or artifice to defraud. The object of the scheme alleged was to defraud the United States of the right to implement its foreign policy free from stealth, false statement, and fraud.

Three weeks after defendant's conviction, the Supreme Court decided *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Supreme Court held that 18 U.S.C.A. § 1341, the mail fraud statute,[5] applies only to schemes to defraud

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[5] The *McNally* analysis applies equally to wire fraud. *See Carpenter v. United States*, 108 S. Ct. 316, 320 n. 6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.").

others of property rights. The Court held that a scheme to defraud citizens of their interest in fair and effective government does not violate section 1341. *Id.* at 2879. Thus, the wire and mail fraud statutes are limited to schemes to deprive others of property rights, although the object of the scheme to defraud may be intangible property rights. *See Carpenter v. United States*, 108 S. Ct. 316 (1987).

McNally applies retroactively. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *see also United States v. Asher*, 854 F.2d 1483, 1487 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 836 (1989). Under *McNally*, defendant could not be convicted of the substantive offense of wire fraud where the object of the scheme was to deprive the government of its right to control its foreign policy. *See generally United States v. Dynalectric Co.*, 859 F.2d 1559, 1570 (11th Cir. 1988). Because the object of the scheme to defraud the government alleged in the indictment is not sufficient to violate section 1343, that scheme does not constitute conspiracy to commit a substantive offense against the United States in violation of the first portion of section 371. *See McNally*, 483 U.S. at 361 ("The Government concedes that if petitioners'substantive mail fraud convictions are reversed their conspiracy convictions should also be reversed."); *see also United State v. Hilling*, 863 F.2d 677 (9th Cir. 1988).

An individual may also violate section 371, however, by conspiring to defraud the United States in any manner or for any purpose. The scope of "defraud" in section 371 is broader than "defraud" as used in section 1343. In *McNally* itself, the Court stated that to "defraud" the government within the meaning of section 371 "also means to interfere with or obstruct one of its lawful governmental functions by

deceit, craft or trickery, or at least by means that are dishonest." *McNally*, 483 U.S. at 358 n.8 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). Therefore, although the object of the scheme alleged in the indictment, to defraud the government of its right to implement its foreign policy, would not support a wire fraud conviction after *McNally*, it would support a conviction under section 371 of conspiracy to defraud the government.

"[A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on insufficient ground." *Zant v. Stephens*, 462 U.S. 862, 881 (1983). A conviction can be affirmed, however, where the legally insufficient charge includes all the elements of a separate, legally sufficient charge also contained in the indictment. In such a situation, the reviewing court can be confident that if the jury found all the elements necessary to convict the defendant on the legally insufficient charge, it must also have found all the elements necessary to convict on the legally sufficient charge. *See, e.g., United States v. Kato*, 878 F.2d 267, 269-70 (9th Cir. 1989); *United States v. Odom*, 858 F.2d 664, 666 n.1 (11th Cir. 1988); *see generally United States v. Ochs*, 842 F.2d 515, 520 (1st Cir. 1988). In this case, if the jury convicted defendant on the wire fraud charge, it necessarily must have found all the elements necessary to sustain a conviction for conspiracy to defraud the government under section 371.

This Court cannot affirm a criminal conviction based on a theory not contained in the indictment, *see generally Stirone v. United States*, 361 U.S. 212, 215-17 (1960), or not presented to the jury. *See generally Chiarella v. United States*,

445 U.S. 222, 237 n.21 (1980). The scope of a conspiracy is that charged in the indictment. *United States v. Dynalectric Co.*, 859 F.2d at 1564. Conspiracy to defraud is a different substantive offense from conspiracy to commit wire fraud. *See e.g., United States v. Sjeklocha*, 843 F.2d 485, 486 (11th Cir. 1988). The dispositive issue on defendant's appeal from his conspiracy conviction, then, is whether the indictment charged him with conspiracy to defraud the United States.

An indictment must set forth the elements of the offense in a manner which fairly informs the defendant of the charges against him and enables him to enter a plea which will bar future prosecution for the same offense. *Belt v. United States*, 868 F.2d 1208, 1211 (11th Cir. 1989) (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)). *See generally Russell v. United States*, 369 U.S. 749, 763 (1962). In this case, the indictment charged defendant with conspiracy to commit four substantive offenses against the United States. Although the fraud was charged as the object of the substantive offense of wire fraud rather than as the object of the conspiracy, defendant had clear notice that violations of the substantive offenses constituted fraud against the government. Conspiracy to violate the substantive offenses *is* conspiracy to defraud the government. Reading the indictment as a whole, we conclude that the indictment adequately charged defendant with conspiring to deprive the United States of its ability to control its foreign policy by concealing material facts from responsible government agencies.

We also conclude that the district court adequately charged the jury on conspiracy to defraud the United States. The court instructed the jury fully on the elements of conspiracy. The court then instructed the jury as follows:

> The fourth object of the conspiracy was to devise a scheme and artifice to defraud the United States and its executive agencies of the right to implement its foreign policy and to conduct its affairs free from stealth. Here again, it is alleged that it was a part of this object of the conspiracy that interstate or international wire communications would be used.

Vol. 29, at 17-18. The district court clarified and repeated this instruction as follows:

> What must be proved beyond a reasonable doubt is that the accused planned knowingly and willfully to devise or intending — to devise a scheme to defraud the United States of America and its executive agencies out of the right to implement its foreign policy and to conduct its affairs free from stealth, false statement, and fraud and that the use of the interstate wire or foreign wire communications were to be closely related to the scheme.

Vol. 29, at 34. Conspiracy to commit wire fraud against the United States contains all of the elements of conspiracy to defraud the United States. Conspiracy to commit wire fraud contains the additional element of use of wire transmission services in furtherance of the scheme to defraud. The district court's charge to the jury, as indicated by the above passages, instructed the jury fully on the elements of conspiracy to defraud the United States in violation of section 371.

The jury could not have convicted defendant of conspiracy in this case without having found an unlawful object of the conspiracy. The indictment adequately charged defendant with conspiracy to defraud the United States, and

the jury was adequately charged on this object of the conspiracy. Under similar circumstances, *Kato, supra*, the Ninth Circuit affirmed a defendant's conspiracy conviction. We agree with the logic of the Ninth Circuit in *Kato*, and the First Circuit in *Ochs*, and consequently we affirm defendant's conviction on the conspiracy count in this case.

B. *The Allen Charge*

The jury began deliberating on May 27, 1987. On June 5, 1987, the jury sent a note to the judge indicating it was deadlocked 8-4 on Count Two, the export violations charge. The district judge did not advise counsel that he had been informed of the numerical breakdown of the deadlock. In response to this note, and over defendant's objection and motion for a mistrial, the district judge gave the jury a modified *Allen* charge. *See Allen v. United States*, 164 U.S. 492 (1896). The jury rendered a verdict of guilty that same day.

This Circuit allows the use of *Allen* charges. *See Thaggard v. United States*, 354 F.2d 735, 739 (5th Cir. 1965),[6] *cert. denied*, 383 U.S. 958 (1966); *see also United States v. Rapp*, 871 F.2d 957, 967 (11th Cir. 1989); *United States v. Norton*, 867 F. 2d 1354, 1366 n.14 (11th Cir.), *cert. denied*, 109 S. Ct. 3192 (1989); *United States v. Rey*, 811 F.2d 1453, 1457-60 (11th Cir.), *cert. denied*, 108 S. Ct. 103 (1987). This Court's inquiry on appeal of a district court's decision to give an *Allen* charge is limited to evaluating the coercive impact of the charge. *United States v. Alonso*, 740 F.2d 862, 878 (11th Cir. 1984), *cert. denied*, 469 U.S. 1166 (1985). The question we address is

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[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

whether under the circumstances and language of the *Allen* charge the jury was unduly coerced into reaching a verdict. *See Norton*, 867 F.2d at 1365-66; *Alonso*, 740 F.2d at 878.

The language the district court used in this case did not deviate from language used in accepted *Allen* charges. Thus, the language itself did not unduly coerce the jury into reaching a verdict. *See Rey*, 811 F.2d at 1459. The circumstances also do not indicate coercion. Although the jury had not reached a verdict prior to the *Allen* charge, the district court had the discretion to urge the jury to spend more time deliberating. *See, e.g., United States v. Gordon*, 817 F.2d 1538, 1543 (11th Cir. 1987), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir. 1988), *cert. dismissed*, 109 S. Ct. 28 (1988). Although the jury returned a verdict the same day that the judge gave the charge, there is no indication that this charge was inherently coercive. *See Rapp*, 871 F.2d at 967; *Rey*, 811 F.2d at 1458.

Defendant challenges the timing of the charge, because the district court gave the charge on a Friday afternoon. The timing of the charge lies in the discretion of the trial court. *See Alonso*, 740 F.2d at 877. The judge gave the *Allen* charge after eight days of deliberation and only after the jury informed him it was deadlocked. There was no abuse of discretion in the timing of the charge. *Compare United States v. Scruggs*, 583 F.2d 238, 239-41 (5th Cir. 1978) (charge given *sua sponte* at 10:28 p.m. on a Friday night was not an abuse of discretion).

Defendant argues his conviction must be reversed because the district court knew the numerical split of the jury at the time it gave the charge. The fact that the judge was aware of the split in the vote does not necessarily mean that

this charge was coercive. *See United States v. Norton*, 867 F.2d at 1365-66 (no reversal even if district judge knowing numerical split gives *Allen* charge absent a showing that the knowledge and the charge were inherently coercive). The district court did not request that information, and, in fact, the court expressly charged the jury not to divulge any numerical breakdown should the jury request further instructions. In these circumstances, we conclude that the district judge's *Allen* charge did not unduly coerce the jury into reaching a verdict.

C. *Evidentiary Challenges*

The government introduced into evidence two documents used to show that the Libyan military had purchased these aircraft. The documents were found in West Germany in a briefcase allegedly owned by Badir. One was a letter by Jabir, purportedly the head of the Libyan military, to Badi, Badir's superior, authorizing the purchase of two L-100-30 jet aircraft with air-to-air refueling capability. The other was a progress report written by Badir to "Chief of Staff Colonel Ahmad Mahmoud" about the purchase of the jets. Defendant challenges the admission into evidence of these letters on several grounds.

1. *Rule 403*

Defendant argues that the district court erred under Fed. R. Evid. 403 in admitting these documents into evidence. Fed. R. Evid. 402 provides that all relevant evidence is admissible. Rule 403 allows the district court to exclude evidence if the danger of unfair prejudice substantially outweighs the probative value of the evidence. Rule 403 is an extraordinary remedy which the district court should in-

voke sparingly. *United States v. Finestone*, 816 F.2d 583, 585 (11th Cir.), *cert. denied*, 108 S. Ct. 338 (1987). The balance under Rule 403 should be struck in favor of admissibility. *United States v. Norton*, 867 F.2d at 1361. In determining whether the district court erred in failing to exclude relevant evidence under Rule 403, this Court must give deference to the discretion of the district judge. *United States v. Howard*, 855 F.2d 832, 837 (11th Cir. 1988). On appeal, this Court should look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact. *Finestone*, 816 F.2d at 585. The district court's admission of evidence will be reversed only upon a clear showing of abuse of discretion. *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983).

Defendant did not object under Rule 403 to the admission of this evidence at trial, although defendant did object that the documents were improperly authenticated. Consequently, this error, if any, is reviewed for plain error. *See* Fed. R. Crim. P. 52(b). "Plain error consists of error which, when examined in the context of the entire case, is so obvious that failure to notice it would substantially affect the fairness, integrity and public reputation of judicial proceedings." *Russell*, 703 F.2d at 1248. This Court will reverse defendant's conviction for plain error only if the erroneous admission of evidence seriously affected substantial rights of the defendant. *United States v. Cortez*, 757 F.2d 1204, 1207 (11th Cir.), *cert. denied sub nom. Martinez-Valdez v. United States*, 474 U.S. 945 (1985).

The district court did not err in admitting these letters. We emphasize that the level of prejudice we consider is the level of *unfair* prejudice. *United States v. Norton*, 867 F.2d at

1362. The documents were relevant to show Badir's intent that the planes would go to Libya. The unfair prejudice to defendant was limited, because there was nothing in either document connecting defendant directly to the Libyan military. Even if defendant is correct in arguing that the district court erred in admitting these two documents under Rule 403, he would not be entitled to relief under the plain error standard. Defendant failed to show any significant unfair prejudice, much less the level of unfair prejudice necessary for a finding of plain error.

2. *Rule 804(b)(5)*

Defendant argues that the district court erred in admitting the Jabir letter under Fed. R. Evid. 804(b)(5). Rule 804 (b)(5) provides for admission of hearsay evidence having circumstantial guarantees of trustworthiness if "(A) The statement is offered as evidence of material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."[7]

We conclude that the district court correctly found that the government satisfied the elements required for admission of the Jabir letter under Rule 804 (b)(5). The presence of corroborating evidence that these planes were destined for

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[7] A preliminary requirement is that the declarant be unavailable. *See* Fed. R. Evid. 804(a)(5). Defendant first argues that the government could have obtained the presence of Badir, and that therefore the declarant was not unavailable. This argument fails for the simple reason that Jabir and not Badir was the declarant. There is no argument that Jabir, the head of the Libyan military forces, was reasonably available to the government.

use in Libya by the Libyan armed forces provides cir-cumstantial guarantees of the trustworthiness of the letter. *See United States v. Chapman*, 866 F.2d 1326, 1332 (11th Cir. 1989). The official stationery and its presence in Badir's briefcase also constitute circumstantial guarantees of trustworthiness. The letter is clearly material, indicating as it does the direct involvement of high Libyan officials in the purchase of these planes. The letter, authored by Jabir, was more probative than any other information reasonably available to indicate that the Libyan military participated in the purchase of these planes. We conclude that the district court did not err in admitting this letter.[8] Even if this letter had been erroneously admitted, however, we would not reverse defendant's conviction, because we conclude that the admission would have constituted harmless error. *See* Fed. R. Crim. P. 52(a).

3. *Authentication*

Defendant challenges the use of circumstantial evidence to authenticate the letters under Fed. R. Evid. 901(a). Use of circumstantial evidence alone to authenticate a document does not constitute error. *United States v. Caldwell*, 776 F.2d 989, 1001-03 (11th Cir. 1985). There is no evidence of adulteration or forgery; thus, there is no reasonable probability of misidentification. *See* Fed. R. Evid. 901(a) (authentication is sufficient if it supports a finding that "the matter in question is what its proponent claims"); *United States v. Shabazz*, 724 F.2d 1536, 1539 (11th Cir. 1984). Fed. R.

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[8] Although the government does not make this argument, this letter may also have been admissible as a co-conspirator statement. *See* Fed. R. Evid. 801(a)(2)(E).

Evid. 901(a) requires only some competent evidence in the record to support authentication. *United States v. Koziy*, 728 F. 2d 1314, 1321 (11th Cir.), *cert. denied*, 469 U.S. 835 (1984). The government introduced evidence that these documents were indeed what the government claimed them to be. We conclude that the district court did not err in finding that the government had properly authenticated the documents.

4. *Expert Testimony*

Defendant claims that the district court erred in admitted hearsay evidence on the identity of Jabir. In attempting to prove that Jabir was the head of the Libyan military, the government called an expert in Libyan history, George Schuler. Schuler testified that Jabir had been announced in the Libyan press in 1970 as commander-in-chief of the Libyan armed forces, and that Jabir was still commander-in-chief at the time the letter was written.

The district court has broad discretion in admitting or excluding expert testimony. The district court's ruling qualifying Schuler as an expert and admitting this evidence will not be reversed unless manifestly erroneous. *United States v. Brown*, 872 F.2d 385, 392 (11th Cir. 1989); *United States v. Sans*, 731 F.2d 1521, 1530 (11th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985). Testimony based on hearsay is inadmissible as a general rule, whether offered by an expert or by a lay person. *United States v. Cox*, 696 F.2d 1294, 1296-97 (11th Cir.), *cert. denied*, 464 U.S. 827 (1983). Fed. R. Evid. 702 allows an individual to be qualified as an expert based on knowledge, experience, and education, and an expert can testify based on his knowledge and experience. Fed. R. Evid. 703; *see United States v. Bagnell*, 679 F.2d 826, 833-34 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983). Once qualified as

an expert in Libyan affairs, Schuler could give his opinion about who Jabir was. His testimony could include hearsay that formed the basis of that opinion. *See United States v. Ramos*, 725 F.2d 1322, 1324 (11th Cir. 1984). The weakness of the basis for his opinion that Jabir was the head of the Libyan military goes to weight rather than to the admissibility of Schuler's opinion. *See Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988).

We need not decide whether the district court erred in admitting Schuler's testimony. In order to be entitled to relief from the erroneous admission of evidence, defendant must show prejudice to substantial rights. *See* Fed. R. Crim. P. 52(a). Defendant, however, does not claim prejudice from the introduction of this testimony. For example, defendant does not argue that Jabir is not in fact the commander-in-chief of the Libyan military. We conclude that the introduction of Schuler's testimony does not constitute reversible error.

5. *Transcript of Tape Recording*

A tape recording of a conversation between defendant and co-defendant Burnham that occurred at Atlanta's Hartsfield Airport on June 27, 1985, was introduced into evidence by the government. At the end of the tape, the individuals making the recording questioned whether defendant was actually involved in the plan to sell these planes to Libya. This trailer portion of the tape was not introduced into evidence. Instead, defendant's counsel cross-examined Boggess, the recording person, regarding his impression of the level of defendant's involvement in the plan. During its deliberation, the jury requested that the tape-recorded conversation be replayed. The trial judge allowed the tape to be

replayed, but refused to allow the jury to listen to the trailer portion of the tape. Defendant argues that this decision constitutes reversible error.

The district court did not err in refusing to allow the jury to consider the trailer portion of the tape. The "trailer" portion of the tape was a recording of a conversation between the individuals who made the tape; it was not a part of the taped conversation between the defendant and co-defendant Burnham. It was not up to the individuals who made the tape to make any judgment as to Elkins' involvement in the conspiracy to sell the planes to Libya. That judgement, as the trial judge properly recognized, was for the jury. That portion of the tape had never been admitted into evidence at trial. No exception to the general rule that the jury cannot consider evidence not introduced into evidence at trial applies in this case. *Compare United States v. Pendas-Martinez*, 845 F.2d 938, 943-45 (11th Cir. 1988) *with United States v. Le Fevour*, 798 F.2d. 977, 981 (7th Cir. 1986).

D. *Prosecutorial Misconduct and Judicial Intervention*

Defendant argues that the prosecutor committed reversible error by giving an inaccurate opening statement and by allowing misleading testimony to be presented to the jury. Defendant also argues that the district judge unfairly interjected himself into the case. Defendant claims that the combination of judicial and prosecutorial misconduct deprived him of a fair trial.

A conviction will be reversed on the basis of prosecutorial misconduct if that misconduct is so pronounced and persistent as to "permeate the entire atmosphere of the trial." *United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir.

1987). The focus is on whether the prosecutor's misconduct deprived the defendant of a fair trial. *See generally Smith v. Phillips*, 455 U.S. 209, 219 (1982). In a similar vein, objective demeanor on the part of the trial judge is crucial to a fair trial, although the judge may within reasonable limits remark on the evidence presented and when appropriate curtail further introduction of evidence. *United States v. Bertram*, 805 F.2d 1524, 1529 (11th Cir. 1986); *see also United States v. Cortez*, 757 F.2d at 1208. The combination of prosecutorial misconduct and improper judicial conduct can, in an extreme case, deny a defendant a fair trial. *See, e.g., McLain*, 823 F.2d at 1462.

In his opening statement the prosecutor told the jury that members of the Libyan Air Force had defected to Egypt in one of the Lockheed L-100-30 airplanes. The government intended to call Egyptian officials to prove this fact. During trial, however, the Egyptian government refused to cooperate, and the prosecutor was not able to prove at trial that this statement was true. Defendant argues that this misstatement in opening argument constitutes prosecutorial misconduct mandating reversal of his conviction.

Defendant did not object to the statement or move for a mistrial at the close of evidence at trial. Consequently, this error must be reviewed under a plain error standard. Fed. R. Crim. P. 52 (b). *See United States v. Walther*, 867 F.2d 1334, 1341 n.3 (11th Cir. 1989); *United States v. Odom*, 858 F.2d at 667. The plain error rule should be used sparingly, and a conviction should be reversed only if "a miscarriage of justice would otherwise result." *United States v. Young*, 470 U.S. 1 (1985). Whether or not it may have been improper to refer in an opening statement to evidence that was never ulti-

mately introduced at trial, this error does not require reversal, *see, e.g., United States v. Sawyer*, 799 F.2d 1494, 1507 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987) (not plain error to refer to confession that was never introduced at trial), particularly because there was no indication of bad faith. *See United States v. Gray*, 730 F.2d 733, 834-35 (11th Cir. 1984).

Defendant argues that the government introduced misleading testimony by a critical witness, Lilly. Lilly testified that the government had not made any promises that he would not be subject to prosecution. In fact, the government never did prosecute Lilly. Defendant relies on the fact that the time for prosecuting Lilly under the Speedy Trial Act expired during defendant's trial to argue that the government never intended to prosecute Lilly, that Lilly knew this, and that therefore Lilly's statement that there was no deal was prejudicially misleading to the jury.

The government has the duty to disclose agreements with prosecution witnesses and to disclose false testimony presented by prosecution witnesses. *See Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th Cir. 1986). Lilly's statement even by the defendant's own argument is not misleading, however. At a hearing held before the district court, attorneys for the government testified regarding their decision not to prosecute Lilly. The attorneys testified that at the time of his testimony, the government had not decided whether or not to prosecute Lilly. Lilly's testimony, that there was no deal at the time of the trial, was true. Defendant does not argue that the government failed to disclose an actual agreement with the defendant. *See United States v. Lacayo*, 758 F.2d 1559, 1562-63 (11th Cir.), *cert. denied*, 474 U.S. 1019 (1985) (agreement granting leniency to witness must be reached

prior to trial to be subject to disclosure). Therefore, there was no fact disclosed or not disclosed that would have misled the jury. *Compare Giglio v. United States*, 405 U.S. 150, 153 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' " (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). We conclude that defendant has not demonstrated any prosecutorial misconduct justifying a reversal of his conviction.

Defendant argues that the district court displayed a lack of neutrality that denied him a fair trial. Defendant does not identify any particularly egregious conduct by the district judge that would mandate a reversal of his conviction. Certainly the judge did not intervene to the extent of indicating his personal feelings about guilt or innocence. *See United States v. Robinson*, 687 F.2d 359, 361 (11th Cir. 1982). The judge did have the discretion to control admission of evidence and to comment on that evidence. *See Bertram*, 805 F.2d at 1529; *Cortez*, 757 F.2d at 1208. We conclude that defendant has not demonstrated any misconduct on the part of the trial judge that mandates reversal of his conviction.

E. *Requested Jury Charge*

Defendant challenges the district court's refusal to give a requested jury instruction. Defendant requested the judge to instruct the jury that the defendant should be acquitted if defendant reasonably believed that Lockheed knew of the Libyan connections with Contrust and had informed the Department of Commerce about those connections.

In reviewing jury instructions, this Court must evaluate whether the entire charge, taken as a whole, adequately pre-

sented the issues and the law to the jury. *United States v. Italiano*, 837 F.2d 1480, 1487 (11th Cir. 1988). The trial judge has broad discretion in formulating a jury charge, and will not be reversed unless the charge does not correctly state the substance of the law and the facts. *United States v. Chapman*, 866 F.2d at 1334; *United States v. Hewes*, 729 F.2d 1302, 1316 (11th Cir. 1984), *cert. denied sub nom. Caldwell v. United States*, 469 U.S. 1110 (1985). The defendant, however, is entitled to instruction on any valid defense that has an evidentiary foundation. *See United States v. Fernandez*, 837 F.2d 1031, 1035 (11th Cir.), *cert. denied*, 109 S. Ct. 102 (1988).

The defense defendant attempted to assert was good faith reliance on Lockheed. Defendant acknowledged at trial, however, that Lockheed lacked full knowledge of the facts. Thus, even if this constituted a valid defense, defendant was not entitled to his requested instruction, because this defense lacked an evidentiary foundation. *See United States v. Parker*, 839 F.2d 1473, 1482 n. 6 (11th Cir. 1988).

F. *Eighth Amendment Challenge to Sentence*

1. *Imprisonment*

In *Solem v. Helm*, 463 U.S. 277 (1983), the Supreme Court held that grossly disproportionate sentences can violate the Eighth Amendment. Federal courts thus must conduct a proportionality review of sentences imposed. *See Marrero v. Dugger*, 823 F.2d 1468, 1473 n.7 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1235, 1247 (1988). This proportionality review is extremely limited: "As the Supreme Court made clear in *Solem v. Helm*, 463 U.S. 277 (1983), it is not normally the role of an appellate court to second-guess the trial judge's determination of an appropriate sentence. Rather, an

appellate court must determine only whether the sentence imposed is so grossly disproportionate to the crime as to constitute cruel and unusual punishment." *United States v. Darby*, 744 F.2d 1508, 1525 (11th Cir. 1984), *cert. denied sub nom. Yamanis v. United States*, 471 U.S. 1100 (1985). In conducting this proportionality review, this Court must evaluate three elements: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. at 292; *see also United States v. Holmes*, 838 F.2d 1175, 1178 (11th Cir.), *cert. denied*, 108 S. Ct. 2829 (1988).

Defendant was sentenced to five years' imprisonment on the conspiracy conviction, and to a consecutive term of ten years' imprisonment and a $6.6 million fine on the export control violation conviction. Defendant also received a special assessment of $50 on each count. Defendant eventually makes one argument that his sentence violated the Eighth Amendment: "Because the harshness of Appellant's sentence far exceeds the sentences imposed in similar export prosecutions in the Northern District of Georgia and elsewhere, Appellant respectfully submits this Court should conclude that his sentence is unconstitutionally disproportionate." A sentence is disproportionate for Eighth Amendment purposes if the punishment is grossly disproportionate when compared with the nature of the crime. In *Solem v. Helm* itself, for example, the Court held that a life sentence without possibility of parole for a non-violent, minor offense violates the Eighth Amendment.

In a variety of situations, life sentences with the possibility of parole have been held not to violate the Eighth Amendment. *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (obtaining $120.75 by false pretenses); *Williams v. Johnson*, 845 F.2d 906 (11th Cir. 1988) (forgery). These sentences, five years for conspiracy and ten years for violating export control laws, certainly are not grossly excessive compared to the nature of the crime. Additionally, the ten-year sentence imposed for violating export control regulations is not grossly disproportionate to the sentences imposed in other federal jurisdictions for violations of the same federal laws. Defendant unlawfully sold $57 million worth of high technology aircraft equipment to an unfriendly nation. Although his sentence may have been longer than the sentences normally imposed for this offense, that fact alone does not mean it was grossly disproportionate within the meaning of *Solem*.

2. *Fine*

Defendant also challenges the fine imposed on count two. There may be circumstances where an excessive fine constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Cf. United States v. Monroe*, 866 F.2d 1357, 1366-67 (11th Cir. 1989). We need not identify those circumstances in this case. Defendant made a gross profit of $13,049,474, a net profit of $7,336,233, and an after-tax profit of $3,368,917 from the sale of these aircraft. Defendant's fine of $6.6 million was less than his gross profit and less than his net profit from the sale of these planes. Although a large amount, we hold that a fine representing an amount less than the net profit of an illegal transaction does not violate

the Eighth Amendment absent a showing of severe, particularized hardship suffered by defendant.

Defendant also argues that this fine exceeds the maximum prescribed by law. We disagree. Violation of the export control laws generally results in fines up to $250,000. *See* 50 U.S.C.A. § 1705(b); 50 U.S.C. App. § 2410(b)(1)(B); 15 C.F.R. § 387.1(a)(1)(ii). Under 50 U.S.C. App. § 2410 and 15 C.F.R. § 387.1, however, the district court could have imposed a fine up to five times the value of the exports. Defendant argues that those sections do not apply, because in extending the Export Administration Act, the President declared by Executive Order No. 12470 that 50 U.S.C. §§ 1702 (b)(2) and 1705 were to control over inconsistent provisions concerning punishment. The Executive Order stated that section 1705 "shall control over any inconsistent provisions in the regulations which respect to . . . civil and criminal penalties for violations subject to this Order." The Executive Order, however, by its express language did not overrule the penalty provision of section 2410, because that statute is not a provision in the regulations. The value of the planes and parts exceeded $57 million. Consequently, we conclude this fine was well within the statutory maximum.

Even if section 2410 did not apply, this fine does not exceed the maximum allowed by law. Title 18, U.S.C.A. § 3623(c)(1), repealed effective November 1, 1987, Pub. L. No. 98-473, applies to fines for crimes committed after December 31, 1984, and before November 1, 1987. *See United States v. Slovacek*, 867 F.2d 842, 849 (5th Cir.), *cert. denied*, 109 S. Ct. 2441 (1989); *United States v. Henson*, 848 F.2d 1374, 1385 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 784 (1989). The relevant acts in this case were committed in the spring of 1985, and there-

fore section 3623 is applicable. Section 3623 allows a fine greater than the amount specified in the statute. *See generally United States v. Cha*, 837 F.2d 392, 394 (9th Cir. 1988); *United States v. Holmes*, 822 F.2d 481, 495 (5th Cir. 1987). Defendant could have been fined twice the gross gain from the sale of the planes, unless imposition of such a large fine would have unduly complicated or prolonged the sentencing process. 18 U.S.C.A. § 3623(c)(1). This fine was less than the amount defendant earned as a gross profit on the sale, and is well within the limits of section 3623. Consequently, we conclude that this fine does not exceed the maximum fine allowed for this offense.

Defendant argues that the district court did not consider the impact of this fine on his family. *See* 18 U.S.C.A. § 3622(a)(4), *repealed*, Pub. L. No. 98-473. This argument has no merit. That information was before the district court, and the transcript indicates that the court considered these factors.

III. CONCLUSION

Defendant's convictions and sentence are AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:
	:
vs.	: CRIMINAL INDICTMENT
	: NO. CR 86-267-A
EDWARD J. ELKINS	:

On this 28th day of August, 1987, came the attorney for the government and the defendant appeared in person and with counsel, Stephen K. Frankel, Esquire, and Howard J. Weintraub, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of before December, 1983, until on or about June 28, 1985, conspiracy to violate the Arms Export Control Act, Title 22, United States Code, Section 2778(b)(2) and 2778 (c); Title 22, Code of Federal Regulations, Section 121, *et seq.*; Title 18, United States Code, Section 1343, as charged in count one of the indictment; on or about May 13, 1985, violation of Arms Export Control Act, Title 50, United States Code, Section 2 and 3623, as charged in count two of the indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on count one of the indictment in the above-entitled cause; TEN (10) YEARS on count two and that the execution of this sentence shall commence to run from the expiration or, or the legal release from, the sentence imposed on count one.

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of 6.6 MILLION DOLLARS. Under the provisions of Title 18, United States Code, Section 3565(a)(1), the court finds by a preponderance of the evidence that the defendant presently can pay a substantial portion of the fine, and therefore,

IT IS ORDERED that he be imprisoned until he transfers to the United States of America all of his interest of whatever kind in all the property, real and personal, listed in the attached exhibit, together with any interest he may own in partnerships or closely held corporations and any patents or copyrights. It is further provided, however, that in the case of personal property owned jointly with another, the defendant will not be required to be imprisoned for failure to convey complete interest in said property to the extent he can demonstrate that the other person acquired an interest from his or her own estate with assets not obtained directly or indirectly from the defendant.

IT IS FURTHER ORDERED that the defendant pay a SPECIAL ASSESSMENT in the amount of FIFTY AND NO/100 DOLLARS ($50.00) each of counts one and two of the indictment. TOTAL ASSESSMENT: ONE HUNDRED AND NO/100 DOLLARS ($100.00)

IT IS FURTHER ORDERED that the clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. OWEN FORRESTER
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE